1986

Southern Title Guaranty Co., Inc. v. Glenn J. Bethers, Tella Mae Bethers : Reply Brief

Utah Court of Appeals

Gregory B. Wall; Wall and Wall; Attorneys for Appellant.
S. Rex Lewis; Leslie W. Slaugh; Howard, Lewis and Petersen; Attorneys for Repsondents.

IN THE SUPREME COURT OF THE STATE OF UTAH

SOUTHERN TITLE GUARANTY CO., INC., a Texas corporation, Plaintiff-Appellant v. GLENN J. BETHERS and TELLA MAE BETHERS, husband and wife, Defendants-Respondents	REPLY BRIEF OF APPELLANT Case No. 860311 860212-CA

REPLY BRIEF

APPEAL FROM AN ORDER OF DISMISSAL OF THE FOURTH DISTRICT COURT IN AND FOR UTAH COUNTY, STATE OF UTAH, THE HONORABLE GEORGE E. BALLIF PRESIDING.

GREGORY B. WALL (3365)
WALL & WALL
Attorneys for Appellant
Suite 800 Boston Building
Salt Lake City, Utah 84111
521-8220

S. REX LEWIS (1953) and
LESLIE W. SLAUGH (3752), for
HOWARD, LEWIS & PETERSEN
Attorneys for Respondents
120 E. 300 No.
P.O. Box 778
Provo, Utah 84603
373-6345

IN THE SUPREME COURT OF THE STATE OF UTAH

SOUTHERN TITLE GUARANTY CO., INC., a Texas corporation, Plaintiff-Appellant v. GLENN J. BETHERS and TELLA MAE BETHERS, husband and wife, Defendants-Respondents	REPLY BRIEF OF APPELLANT Case No. 860311

REPLY BRIEF

APPEAL FROM AN ORDER OF DISMISSAL OF THE FOURTH DISTRICT COURT IN AND FOR UTAH COUNTY, STATE OF UTAH, THE HONORABLE GEORGE E. BALLIF PRESIDING.

GREGORY B. WALL (3365)
WALL & WALL
Attorneys for Appellant
Suite 800 Boston Building
Salt Lake City, Utah 84111
521-8220

S. REX LEWIS (1953) and
LESLIE W. SLAUGH (3752), for
HOWARD, LEWIS & PETERSEN
Attorneys for Respondents
120 E. 300 No.
P.O. Box 778
Provo, Utah 84603
373-6345

TABLE OF CONTENTS

AUTHORITIES CITED

Page

CASES:

SECONDARY AUTHORITIES:

IN THE SUPREME COURT OF THE STATE OF UTAH

SOUTHERN TITLE GUARANTY CO., INC., a Texas corporation, Plaintiff-Appellant v. GLENN J. BETHERS and TELLA MAE BETHERS, husband and wife, Defendants-Respondents	REPLY BRIEF OF APPELLANT Case No. 860311

The appellant responds to Point I of the respondents' brief, which states that "the evidence does not clearly preponderate against the trial court's finding and conclusion that defendants were not unjustly enriched," as follows:

Throughout the respondents' brief they have raised for the first time on appeal a number of issues which, needless to say, cannot be raised for the first time on appeal. The first of these is the position that appellant cannot prevail on unjust enrichment because the Bethers did not have knowledge of what their agent was doing as far as individual lot releases, receipt of funds, etc. They just simply sat back and collected the money as it rolled in. There are two problems with this argument. The first is that the lack of knowledge by Bethers was never raised as a defense, does not form a part of the findings by the court and does not constitute in any way a basis for the court's judgment. This point is raised for the first time here, and it is raised repeatedly. We submit that this point of argument should be discarded and ignored by this court.

The second problem with this position is that the Bethers are charged with the acts and knowledge of their agent. This point is so basic that it should almost go without saying. "As a general rule, where the relation of agency legally exists, the principal will be liable to third persons for all acts committed by the agent in his behalf in the course and within the actual or apparent scope of his authority." 3 C.J.S. Agency, Sec. 390. Hornbook law, to say the least. Bethers cannot claim the benefit of the agent's actions, yet when something goes awry claim lack of knowledge of every act of his agent as a defense. Enough on this basic point.

The statement that "the determination of when and how the proceeds from a Certificate of Deposit were to be paid to defendants was made by Sunwest. . . " is completely in error. The arrangement between the parties on payoffs was controlled by the agreements between the parties. Not the arbitrary decisions of Sunwest.

Another point raised for the first time on appeal is the allegation that "the only evidence presented to the Court as to why Lot 1 was not released is that Valley Title determined, after a meeting with one of the defendants and a representative from Sunwest, to release Lot 5 rather than Lot 1. (Ex. 8.)" [Respondents' brief p. 11.] This factual allegation is not found in the findings, was not raised as an affirmative defense anywhere in the pleadings filed by the defendants, and the exhibit was not offered for the purpose of raising this point. (Tr. 28) The fact of the matter is that Exhibit 8 was introduced solely to show that the title company had written a reply letter wherein appellant's counsel was informed by the title company that there was still a balance

owing. (Lines 3,4 and 5 of Tr. 28) Thus, this point should be ignored by this court, which point, I might add, is raised throughout the defendants' brief. Evidence to refute such a position was available and this was known by defendants' counsel, which counsel was a different attorney than the attorney preparing the brief of the respondents.

Respondents argue that the testimony of Mr. Hall from the title company was ". . . anything but convincing." (Respondents' brief, p. 11) We urge the court to examine closely the testimony of Mr. Hall. It is quite clear that he knew very well what was going on, the procedures that were used, and the import of the matters and evidence brought up and produced at the time of trial. Quite to the contrary, Mr. Hall's testimony is quite cogent.

The defendants also argue that the money received ". . . was not earmarked nor specified as being related to any particular lot." (P. 12, Respondents' brief) This statement is completely contrary to the facts set forth in appellant's brief, and is unsupported in respondents' brief by any reference to any supporting evidence. At the same point in respondents' brief it is also argued that the money received was for the release of Lot 5. No such evidence exists. It should be borne in mind that respondents did not present any evidence of their own, and much of their brief is an attempt to put on their case to try and refute the facts that were before the court at the time it made its ruling. This they should not be permitted to do.

On page 12 of the respondents' brief it is argued that "there was no net benefit conferred on defendants. * * * Finally, it was not inequitable for defendants to retain the benefit, where defendants received no more than that which Sunwest had contracted to pay and the remaining balance due was equal to the release prices for the remaining two lots." We find subtly argued here an argument made repeatedly by the defendants throughout these proceedings, that being that the plaintiff is somehow obligated to show a net increase to the defendants and to show where the error in accounting lies. This is grossly in error. As we have argued in our initial brief, all the plaintiff should have to show is that Lot 1 was paid for by the prececessors in interest of the plaintiff's insured. If we can show that Lot 1 was paid for, which we have done, then that is the end of the issue. Plaintiff is not obligated to pursue the matter further. Plaintiff is not obligated to see that the defendants get something extra from the transaction, or point out the source of the problem that has created the confusion in this case. Again, as stated, if the plaintiff can show that Lot 1 was paid for, that the defendants received those funds, then those funds are to be credited to that lot only, with the further resulting entitlement on the part of the buyers, and their successors in interest, to a clear fee title to that lot. It is also necessary to point out here that the allegation that the remaining balance due was equal to the release prices for the remaining two lots is totally without evidentiary support. No accounting or other evidence was produced by the defendants to support this position, or any other position, for that matter.

On page 13 of their brief, respondents state as follows:

> "It may be that plaintiff and the parties who purchased Lot 1, taken together, may have paid twice for Lot 1. It may follow that someone was unjustly enriched through receipt of those payments. That someone may have been Sunwest which, in contrast to defendants, received a payment labeled as being for Lot 1 and had knowledge concerning the chain of events which plaintiff now claims shows that defendants received a payoff for Lot 1. The evidence presented at trial does not address these questions."

I don't know what trial counsel is referring to, but it is certainly clear that at the trial of this matter these were the very issues that were raised, and for which evidence was produced. This statement, too, would seem to be an implied admission that Lot 1 was in fact paid for. It is certainly clear that Sunwest didn't retain the money because the evidence showed that the CD purchased for Lot 1 was received by the title company, was designated on the CD and on their records as having been received for Lot 1, was later redeemed and the funds from that redemption clearly and unequivocably traced to the Bethers, who cashed the check and retained the funds. These facts are clear and are totally ignored by the defendants.

As to the respondents' point II, the following reply is made:

The respondents seem to argue that the claim of the plaintiff is baseless because the money of the original purchasers was paid to Sunwest and the title company. So what? The title company was defendants' agent, Sunwest redeemed the CD in question and paid those funds to Bethers. The purchasers do not have to pay the money directly to defendants for plaintiff to have a cause of action. They go on to argue that ". . . the money which was

ultimately received by defendants was not for the release of Lot 1 as far as the defendants were concerned." (Page 14, Respondents' brief) It doesn't matter what the concern of the defendants was as long as the money paid was to be applied for the purchase of a particular lot. This is the nature of the transaction and the funds are to be credited towards a lot designated by Sunwest. The funds are not to be credited however the defendants may wish. In addition, it is clear from Mr. Bethers testimony that he had no idea what was going on with the money and to which lots monies were to be applied. The title company handled all of that. The Bethers didn't even maintain any records which showed for which lots payments were being made. How then can the defendants have any opinion or concern on the matter? They know nothing. I might also add at this point that this issue of defendants would seem to be one concerning a new issue not presented in the case, not used as a basis for the judgment, and raised for the first time here--again.

Defendants go on with the redundant argument on page 15 that "a second infirmity of plaintiff's argument is in its assumption that plaintiff acquired a right of action against defendants for a release of Lot 1 by reason of being subrogated to the rights of the purchasers of Lot 1." This is a standing issue which was raised by summary judgment in the court below and which issue was decided in favor of the plaintiff. A chain of title was clearly established and the right of the plaintiff to maintain the action was ruled upon by the court in favor of plaintiff. This argument is an attempt to raise that issue anew. It should also be noted that this point did

not form a basis of the lower court's judgment in favor of the defendants which is the basis of this appeal. The defendants further argue that plaintiff has no right to maintain this action because no payment was made directly to defendants by certain undesignated parties, and Norman Anderson and his successors in interest had no contract with the defendants. First, as stated above, they do not have to make the payment directly to the defendants to have a claim against defendants for their wrongful conduct. That would be a pointless and empty act. The only consideration is whether or not the defendants received the monies due for Lot 1. The plaintiff isn't entitled to bring this action only if Norman Anderson went to Glenn Bethers and paid him personally for Lot 1. All of these obtuse and tangential arguments do nothing but attempt to obfuscate the real issues. The fact is that the Bethers did receive the funds in question. Those funds were paid to them by Sunwest. That is all that matters. I might also add still again that this point does not form a basis of the lower court's decision, and was never raised as a defense during the course of the proceedings.

In addition, the Andersons and their successors in interest, including this plaintiff, do have a contract with the defendants. They have an unbroken chain of warranty deeds with their attendant warranties.

On page 15 of the defendants brief they next argue that plaintiff cannot maintain this action because of finding number 20 of the Findings of Fact (R. 192), which states that "Sunwest II

would not have been entitled to a reconveyance of Lot 1 on October 25, 1984, without paying to the defendants at least the sum of $9,563.38." The court here is not addressing itself to the issue of legal standing. The court had already ruled plaintiff was entitled to maintain its action (which ruling has not been appealed). The court is simply finding that it doesn't believe the defendants were paid twice of Lot 1.

Defendants next argue (page 15, Respondent's brief) the incredible notion that "plaintiff's [sic] admitted at trial that defendants had not received any more than what they were entitled to receive under their contract with Sunwest, and that defendants had not been unjustly enriched if the entire transaction between Sunwest and defendants was viewed as a whole." This peculiar and grossly distorted interpretation of the case would cause one to believe that the plaintiff at the trial admitted it didn't have a case, but thought it would proceed in any event. It is important that we adhere to a realistic situation and not dabble in fantasy. The plaintiff has never taken such a position, and has never made any such admission.

The defendants go on to argue that plaintiff paid the money with full knowledge of all of the facts and therefore cannot obtain a refund of the money. Nothing could be further from the truth. It is very clear that when the money was paid the plaintiff's counsel and the plaintiff did not have a <u>full</u> knowledge of <u>all</u> of the facts. Indeed, the plaintiff relied upon facts supplied to it by the defendants' agent to the effect that the monies owing

for Lot 1 had never been received. Based upon these representations, and other assurances from defendants that the monies were still due, the funds in question were paid in order to protect the interest of plaintiff's insured in the subject property. Contrary to what the defendants argue, plaintiff does not waive its rights by not first filing a lawsuit to determine if the money is due. This court has held that "a waiver is the intentional relinquishment of a known right. To constitute a waiver, there must be an existing right, benefit or advantage, a knowledge of its existence, and an intention to relinquish it." American Savings & Loan Assn. v. Blomquist, 21 Utah 2d 289, 292 445 P2d 1, 3 (1968). None of these elements are satisfied here, and defendants' allegation is an empty claim, unsupported by any evidence or any reference to the record on appeal. If plaintiff felt it had a reasonable basis to believe that the payment for Lot 1 was still due, then it was entitled to act upon that belief, and not be required to instigate possibly needless litigation to protect its position in case it was wrong, or to go fishing for a possible alternative fact situation. This court has before admonished against the use of litigation for fishing purposes. (See Shayne v. Stanely & Sons, Inc., 605 P2d 775, Utah 1980.) Further, it is quite obvious that the plaintiff did not have full knowledge of all of the facts. (Even if it did, their allegation is again unsupported by any reference to the record.) It was not until later that it appeared that defendants had been paid twice. How defendants can conclude that plaintiff had all of the facts at the time the payment was made is beyond the understanding of the plaintiff. Furthermore, it is interesting to

note that any reasonable person in plaintiff's position, had that person known all of the facts, had they known at the time the payment was made what is now known, would never have made the payment, and would have resisted in the courts any efforts on the part of the defendants to foreclose their deed of trust. It is also important to keep in mind that the information upon which the plaintiff relied was supplied by the defendants through their agent. They cannot be allowed to provide false information, regardless of the motive, or their best intentions, and then claim that plaintiff cannot proceed against them because it should have known better.

It should also be noted in their point II that defendants continue time and time again to claim ignorance of any of the goings on as a defense to any and all claims, ignoring all the while that it was defendants' agent that was involved in the thick of things, and for whose actions and knowledge the defendants are chargeable.

As to defendant's point III, the following reply is made:

The whole issue of mistake is raised throughout the proceedings below, beginning with the plaintiff's complaint filed at the outset of these proceedings. Mistake is central to the whole case. As this court stated in Mabey v. Kay Peterson Construction Co., Utah, 682 P2d 287, 289 (1984),

> "[W]hen issues not raised by the pleadings are tried by express or implied consent they shall be treated in all respects as if they had been raised in the pleadings. Rule 15(b) [U.R.C.P.]; Poulsen v. Poulsen, Utah, 672 P2d 97 (1983); General Insurance Co. of America v. Carnicero Dynasty Corp., Utah, 545 P2d 502 (1976); Holdaway v. Hall, 29 Utah 2d 77, 505 P2d 295 (1973)."

Actually, under the facts of this case it would be virtually impossible to deal with the case without discussing in detail the issue of mistake.

As to point IV, it should not even be dignified by a reply, except to say that had counsel paid attention to the nature of the case he would see that this is a case revolving around the import and effect of the facts, and the outcome is not dependent in any significant degree upon legal issues to be supported by authorities.

CONCLUSIONS

This is a case that centers on whether or not sufficient factual proof has been produced to show and prove that the defendants in this action have been paid twice for Lot 1. We believe that the detailed presentation of the facts in our original brief on appeal show that an unbroken chain in the delivery of funds from the original purchaser--Norman Anderson--to the original seller--the Bethers--existed. Thus, when Norman Anderson paid Sunwest at the closing for Lot 1, funds to release that lot from the all encompassing deed of trust were paid to the Bethers, and that when the CD was issued and delivered to the title company, at which time the lot was to have been released per the agreement with defendants but was not, Lot 1 was the lot designated by Sunwest as the lot for which the CD was being deposited. The case is that simple, When there is ample proof that Norman Anderson paid for the lot, that a CD was purchased and deposited with the title company, designating the CD to be for Lot 1, and when that

very same CD was later redeemed and the funds from that CD redemption then paid to the defendants, it is hard to imagine how they can claim they haven't been paid for the lot. Thus, when the plaintiff, believing that the lot had not been paid for paid the subject amount to the defendants, the lot was paid for a second time. Any other issues or points are beside the point, and that includes all of this talk about substitute collateral. Defendants seem to feel that if plaintiff wants its money back it has to substitute back in the same lot, other collateral to protect the defendants. Nonsense--literally. If defendants have been paid twice for the lot they are not entitled to the return of the lot before they are obligated to return the duplicated purchase price.

At the trial these facts were argued to the court. The following dialogue ensued:

THE COURT: Now, assuming that that is all true, and that that's what that chain would establish, don't you still have to prove that Mr. Bethers received something beyond what the contract price required to be paid him for his property? You're just claiming unjust enrichment?

Mr. WALL: We're claiming unjust enrichment in that--and it's in the Pretrial Order that in addition to having received that amount for Lot 1, Southern Title now has also, because of the mis-up, wherever it has occurred, has also paid him for Lot 1.

THE COURT: Don't you have to show that the total payments he has received have exceeded the amount that he was entitled to under the contract? Not just isolate it on Lot No. 1 and the

way things came down on Lot 1?

MR. WALL: I don't believe so, your Honor." (Tr. 80)

Herein lies what we believe to be a key error in both the reasoning of the court and that of the defendants. Certainly if we could show where the money had been wrongly credited, and/or show that defendants had been paid more than they were entitled on an overall basis, then plaintiff's case would be substantially bolstered. However, plaintiff has been unable to show where the overall error lies, but plaintiff has been able to show that when Lot 1 was paid for the credit didn't go to Lot 1. If the agreement between the parties had been such that monies paid didn't go to particular lots, then defendants would have a point, but when the terms of the agreement are such that when a particular lot is paid for it is to be released and a reconveyance issued, then that lot should be released and reconveyed, without regard or concern for other problems between the parties. In this case we submit that the court was wrong. That we can isolate Lot 1 only and show that it was paid for. If we can do that, and key to this case is our position that we have shown that, then that lot should have been reconveyed years ago when Norman Anderson bought the lot, and any payments paid for that lot afterwards, such as that by the plaintiff, become superfulous, and thus funds to which the defendants are not entitled.

Also, if plaintiff were a party to the original contract, as is Sunwest, and in the place of Sunwest, then how the payment of plaintiff was to be credited, and whether or not defendants are

entitled to retain those funds would be issues to be resolved upon different grounds and from a different perspective. However, that is not the case here, and as a result we respectfully submit that the decision of the district court was in error and the plaintiff is entitled to a return of its monies.

DATED this 17th day of December, 1986.

GREGORY B. WALL
WALL & WALL
Attorneys for Plaintiff-Appellant
Suite 800 Boston Building
Salt Lake City, Utah 84111
521-8220

CERTIFICATE OF MAILING

This is to certify that four (4) copies of the foregoing Reply Brief of Appellant were mailed, postage prepaid, to S. Rex Lewis, attorney for defendants-respondents, 120 E. 300 N., Box 77 Provo, Utah, 84603, on the 17th day of December, 1986.

GREGORY B. WALL